In Reusens *v.* Lawson, 91 Va. 226, 237, 21 S. E. 347, 350, the court says: "The relation of landlord and tenant is one carefully guarded by the law, and it will not allow one who has come into the possession of land under another to set up an adverse claim to it without full notice of his disclaimer or assertion of adverse title." Hulvey *v.* Hulvey, 92 Va. 182, 23 S. E. 233; Neff *v.* Rymon, supra.

Applying these principles to the evidence, it is clear that the plaintiffs were not in possession of the land at the institution of this suit, and therefore were not entitled to invoke the equitable jurisdiction of the court.

For these reasons, the decree appealed from must be reversed and the bill dismissed.

Reversed.

VIRGINIA-CAROLINA RY. CO. *v.* CLAWSON'S ADM'R.

Sept. 15, 1910.

[68 S. E. 1003.]

1. Railroads (§ 308*)—Death of Pedestrian—Negligence—Evidence—Weight.—In an action against a railway company for the death of a boy struck by a locomotive, evidence held to show that the engineer could not have discovered decedent's peril in time to have saved him.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1356-1359; Dec. Dig. § 398.*]

2. Railroads (§ 396*)—Contributory Negligence—Capacity of Children—Burden of Proof.—The burden was on a railway company sued for the death of a boy struck by a locomotive to rebut the legal presumption that he was incapable of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1342; Dec. Dig. § 396.*]

3. Negligence (§ 85*)—Degree of Care Required of Infants.—Ordinarily less care is required of an infant than of an adult respecting his own personal safety, but his responsibility is always to be measured according to his maturity and capacity as determined by the particular circumstances.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 121-129; Dec. Dig. § 85.*]

4. Railroads (§ 382*)—Contributory Negligence—Infants.—An intelligent boy, 11 years old, who had kept a refreshment stand, had

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

driven a horse, had lived near railway tracks, and was frequently around them, possessed sufficient capacity to appreciate the danger of crossing a track, as affecting the railway company's liability for his death caused by a locomotive striking him.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1297-1304; Dec. Dig. § 382.*]

5. Railroads (§ 382*)—Death of Pedestrian—Proximate Cause—Contributory Negligence.—An 11 year old boy struck by a locomotive while attempting to cross in front of it was guilty of contributory negligence barring recovery for death, where there was an unobstructed view of the locomotive's approach.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1301; Dec. Dig. § 382.*]

Railroads (§ 367*)—Duty of Enginemen to Keep Lookout.—The duty of locomotive enginemen to keep a reasonable lookout for persons on the track does not necessarily require that both the engineer and fireman should be on the lookout at the same time.

[Ed. Note.—For other cases, see Railroads, Cent Dig §§ 1257, 1258; Dec Dig § 367.*]

Error to Circuit Court, Washington County.

Action by Fred Clawson's administrator against the Virginia-Carolina Railway Company. From a judgment for plaintiff, defendant brings error. Reversed.

WHITTLE, J. In our view of this case the only assignment of error which calls for extended notice is the action of the trial court in overruling the motion of the plaintiff in error, the defendant below, to set aside the verdict of the jury on the ground that the contributory negligence of the plaintiff's intestate was the proximate cause of the accident.

It is insisted in that connection that if it be conceded that the crossing at which the accident occurred was a public crossing, which imposed upon the railway company the duty of giving signals of the approach of its trains, and that it negligently failed to give such signals by blowing the whistle or ringing the bell, and to keep a reasonable lookout for persons on the crossing, as charged in the declaration, nevertheless the plaintiff's own evidence shows such contributory negligence on the part of his intestate as would bar a recovery.

The essential facts of the case may be summarized as follows: Fred Clawson, plaintiff's intestate, a boy about 12 years and 10 months old, was run over and killed by an engine and tender of the defendant in the daytime, at the extract company's crossing in the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

town of Damascus. The engine was drifting downgrade at a rate of speed variously estimated at from 8 to 20 miles an hour. At the point of accident the track of the defendant's railway, the Virginia-Carolina, and that of the extract company run parallel with each other, with an intervening space of 25 feet between rails. Clawson was playing with several other boys on the east side of the Virginia-Carolina track near the crossing, when the yard foreman of the extract company, who was shifting a box car on their track, called to them from the top of the car to come over and remove a plank which was lying across the rails. In response to his request two of the boys, Clawson and Tolley, crossed over to the west side of the Virginia-Carolina track, and Clawson removed the obstruction. Tolley was at the crossing and Clawson 15 feet above when they undertook to recross the Virginia-Carolina track. Tolley preceded his companion, and the engine was within a few feet of him when he cleared the eastern rail. Clawson was struck "just as soon as he got on" the track. This, in varying language, is substantially the account of the accident given by eyewitnesses of the plaintiff.

The engineer testified that he saw Tolley on the track at the crossing and Clawson at the side of the track a few feet above, but did not know of his attempt to cross in front of the engine until after the accident. It is clear from all the evidence that it was not possible for the engineer to have discovered Clawson's peril in time to have saved him.

Clawson being under 14 years of age at the time of the accident, the burden rested upon the defendant to rebut the legal presumption that he was incapable of contributory negligence. To meet that burden, the defendant, without contradiction, proved that he was a very intelligent boy; that he had formerly kept a stand in Damascus from which he sold pop and candy, and frequently drove his father's one-horse wagon, hauling wood and hay and other feed. (His father testified that he had a hired driver, and that, if his son ever drove the wagon unattended, it was without his knowledge.) The evidence also showed that the elder Clawson had been an engineer on the Virginia-Carolina Railway for about 16 or 18 months, and that young Clawson had lived for several years in the immediate vicinity of the railroad; that he was frequently about the track, and crossed it in going to school when his father lived at Louderdale.

Ordinarily a less degree of care is required of an infant than of an adult, but his responsibility is always to be measured according to his maturity and capacity, and determined by the circumstances of the case as shown by the evidence. Washington, etc., R. Co. *v.* Quale, 95 Va. 741, 30 S. E. 391; Roanoke *v.* Shull, 99 Va. 419, 34 S. E. 34; 75 Am. St. Rep. 791. See, also, 29 Cyc. 535.

In McDaniel *v.* Lynchburg Cotton Mills Co., 99 Va. 146, 37 S. E. 781 (an elevator case), a boy 12 years and 8 months old was held guilty of contributory negligence, "with which he was properly chargeable by reason of his maturity and intelligence," and his administrator was denied a recovery for an accident which occasioned his death.

So, also, in Seaboard, etc., R. Co. *v.* Hickey, 102 Va. 394, 46 S. E. 392, it was held "that an intelligent boy upwards of eight years of age, who was familiar with railroad trains and who had been repeatedly warned to keep off of moving cars," was guilty of contributory negligence in attempting to get on a flat car while the train was in motion, and could not recover for resulting injury.

These cases serve to illustrate the general principle with respect to the age and degree of intelligence and capacity necessary to render a child responsible for failure to exercise reasonable care for his own safety.

While the law sedulously guards the safety of an infant who is too young and inexperienced to be conscious of danger, or to exercise judgment and discretion in protecting himself, the rule is otherwise where he has attained sufficient age and experience to observe and avoid danger. In the latter case the law imposes upon him the obligation of using the reason he possesses, and of exercising a degree of care for his protection commensurate with his maturity and capacity, and for failure to do so will visit upon him the consequences of his own negligence.

In Thompson on Negligence, § 1492, the author observes: "In case of a child old enough to be in the language of the law sui juris, which roughly speaking means able to take care of himself, the question of his contributory negligence in attempting to cross a railroad track would be a question for a jury under much the same circumstances that it would in case of an adult."

The evidence which as we have seen was undisputed on the point leaves no room to doubt that plaintiff's intestate possessed ample capacity to have appreciated the danger of his surroundings, and his own negligence proximately contributed to the accident which cost him his life.

The oft-repeated language of Riely, J., in Johnson *v.* Chesapeake, etc., R. Co., 91 Va. 171, 179, 21 S. E. 238, 240, is very much in point: "The track itself was a proclamation of danger. It was his duty before going upon it to use his eyes and ears. He should have both looked in either direction from which a train could come and listened; and, if his faculties warned him of the near approach of a train, it was his duty to keep off the track. If he had done so in this instance, he could not have failed to hear and see the coming train, and be made sensible of the danger of going upon the track. It was in plain view. And if he failed to

look and listen, as duty required of him, and attempted to cross the track in front of a rapidly moving train, and was caught before he got across and killed, his own act, his own negligence, so contributed to the injury that a recovery therefor cannot be sustained."

In the instant case there was an unobstructed view of the track in the direction from which the engine was coming for more than 1,500 feet.

In Southern Railway Co. *v.* Daves, 108 Va. 378, 61 S. E. 748, it was said: "A railroad company cannot be held liable for the failure of its engineer to anticipate that a person, whether infant or adult, approaching a crossing, is going to step upon the track immediately in front of a moving engine, unless there is something to suggest to the engineer that such person does not intend to remain in a place of safety until the train has passed."

As the case must go back for a new trial, it is proper to say that upon evidence similar to that at the first trial instruction No. 1—that the duty to keep a reasonable lookout does not necessarily require that both the engineer and fireman should be on the lookout at the same time—ought to be given. Brammer *v.* N. & W. Ry. Co., 104 Va. 150, 51 S. E. 211.

For these reasons, the judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial.

Reversed.